

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Section 164
Title 14, California Code of Regulations
Re: Harvesting of Herring Eggs on Kelp

I. Date of Initial Statement of Reasons: May 22, 2004

II. Dates and Locations of Scheduled Hearings:

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| (a) | Notice Hearing: | Date: June 25, 2004
Location: Crescent City, CA |
| (b) | Discussion Hearing: | Date: August 6, 2004
Location: Bridgeport, CA |
| (c) | Adoption Hearing: | Date: August 27, 2004
Location: Morro Bay, CA |

III. Description of Regulatory Action:

- (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

Under existing law, herring eggs on kelp (HEOK) may be taken for commercial purposes only under a revocable, nontransferable permit, subject to such regulations as the Fish and Game Commission shall prescribe. Current regulations specify permit limitations; season; fishing area; permittee categories and qualifications; permit conditions; royalty fees; permit application procedures; permit performance deposit requirements; gear, fishing and harvesting restrictions; fishing quotas; landing and processing requirements; and permit suspension conditions and procedures. In addition, current regulations limit the number of permits that can be issued.

The proposed regulatory changes will establish fishing quotas for the 2004-05 HEOK fishing season. Herring eggs on kelp fishing occurs only in San Francisco Bay, and individual HEOK quotas will depend on the total herring fishery quota for San Francisco Bay established by the Fish and Game Commission under Section 163, Title 14, CCR.

Pacific herring occur in four primary spawning areas of California, in San Francisco Bay, Tomales Bay, Humboldt Bay, and Crescent City Harbor. The Department manages these populations as separate stocks. The commercial herring fisheries on these stocks are closely regulated through a catch quota system to provide for adequate protection and utilization of the herring resource. The Department conducts annual assessments of the size (spawning biomass) of the spawning populations of herring in San Francisco and Tomales bays. In addition to the assessment of spawning biomass, the Department examines the age structure of the spawning population, growth and general condition, biological aspects of the catch, and environmental conditions. These data serve as the basis for establishing fishing quotas for the next successive season.

The 2003-04 spawning biomass estimate for San Francisco Bay is 34,400 tons (including catch), which is below the 26-year average of 51,521 tons. One of the Department's fishery management goals is to allow the harvest of age four and older herring and to avoid the harvest of two and three year old herring which are entering the Bay to spawn for the first time. However, since the 1997-98 El Niño, there has been a decline in the estimated number of age four and older herring which support the fishery. There has also been an increase in the number of three year old herring in the catch.

Biologist's concerns about the status of the San Francisco Bay population led the Department to seek an independent peer review following the 2002-03 season through the California Sea Grant program (see Attachment 1). The review focused on the use of a stock assessment model for the San Francisco Bay herring population as well as the survey methodologies (spawn deposition survey and hydroacoustic survey) used to generate the annual spawning biomass estimate in San Francisco Bay. The peer review panel's review found that the San Francisco Bay herring population has been reduced to a level of roughly 20 percent of its unfished level and is presently at or near the lowest abundance observed since the 1970's. The peer review panel also found that the age composition of the catch has changed towards younger individuals. The peer review panel recommended that the Department implement a rebuilding policy.

The peer review panel also noted that the tendency of using the higher value of either the spawn survey or the hydroacoustic survey, during the process of meshing the surveys, as the basis for setting quotas has contributed to the overestimation of spawning biomass and subsequently, overexploitation of the population by the commercial fishery. In addition, the peer review noted, the spawn deposition survey tends to underestimate spawning biomass by about 10 percent and the hydroacoustic survey tends to overestimate the spawning biomass by about 20 percent. The errors (coefficients of variation) in the annual spawning biomass indices are about 40 percent for the spawn deposition survey and about 75 percent for the hydro-acoustic survey, indicating that the spawn deposition survey is a better estimate of the spawning biomass. Based on the Department's continued concerns about the status of the San Francisco Bay herring population and the recommendations of the peer review panel, the biomass estimate for the 2003-04 season is based on the spawn deposition survey as a conservative measure.

In response to the peer review report recommendations and in an effort to facilitate re-building the population, the Department is moving forward with the following: (1) the Department is proposing a 10 percent exploitation rate for the 2004-05 season; (2) the Department is researching options for establishing a population threshold; (3) the spawn deposition survey will continue on an annual basis as the primary index of abundance and biomass estimate, and the hydro-acoustic survey will continue as support for the spawn deposition survey; and (4) random sampling, instead of collecting 17 fish per 10 millimeter size intervals, is now the method used for obtaining age composition information from the fishery and survey catch. Final age composition continues to be done by aging the otoliths (ear bones).

The annual herring fishing quota is allocated solely to the herring fishery authorized pursuant to Section 163. Consequently, all herring eggs on kelp permittees must hold a herring permit. To fish herring eggs on kelp, a herring permittee must waive his or her herring fishing privileges under Section 163 and "exchange" his or her "share" of the herring quota for an equivalent herring eggs on kelp quota. The current factor used to convert an equivalent amount of resource from the sac roe fishery to the herring eggs on kelp fishery is 0.2237.

Within the overall quota in San Francisco Bay, separate quotas are established for each gill net platoon (i.e., December, Odd, and Even). The overall quota is divided among the three platoons in proportion to the number of permits in each platoon. In 1994, the Commission decided to provide HEOK permittees possessing "CH" permits with a HEOK quota equal to approximately 0.79 percent of the overall quota.

The proposed quota for the 2004-05 San Francisco Bay herring fishery is 3,440 tons, representing 10 percent of the 34,400 ton estimated spawning biomass. If the Commission were to adopt this quota, this would result in a 6.0-ton individual quota for a "CH" gill net permittee and a 1.7-ton individual quota for a non-"CH" gill net permittee participating in the HEOK fishery.

Annual management recommendations to improve or provide for the efficient harvest and orderly conduct of the HEOK fishery are solicited from interested fishermen and individuals at public meetings and from the Director's Herring Advisory Committee, which is composed of representatives from the commercial herring fishing industry (See Attachments 2, 3, 4, 5, and 6). The proposed amendments to Section 164, Title 14, CCR, reflect, in part, Department recommendations presented to the Director's Herring Advisory Committee. The Department will also prepare an Environmental Document, pursuant to the requirements of the California Environmental Quality Act. This Environmental Document will be released for public review in late July 2004. Certification of the Environmental Document is scheduled to occur at the August 27, 2004, Commission meeting in San Luis Obispo.

Proposed changes relating to definitions are recommended to improve the clarity of the regulations, or provide for the efficient harvest and orderly conduct of the fishery and for the protection of the resource. The following is a summary of the proposed changes: (1) re-define the requirements for prior permittee status, (2) specify an additional requirement for a line used in HEOK fishing, and (3) correct references to processing for consistency with existing regulations. Minor corrections are also proposed for the purposes of accuracy and consistency with other regulations.

The HEOK permittees have requested that the requirement, as specified in subsection (f)(1)(B), that a person defined as a prior permittee participating in the herring eggs on kelp fishery suspend kelp for herring eggs on kelp fishing during the immediately preceding season be removed. This requirement was originally proposed by fishery participants to ensure that those participants who had a previously vested interest in the fishery be given priority in applying for a HEOK permit. The Department supports the proposed amendment to subsection (f)(1)(B) to change the requirement to specify that a permittee must have renewed their herring eggs on kelp permit for the immediately preceding herring eggs on kelp season. The proposed change would also specify that the permittee must have submitted all fees from previous seasons.

Subsection (j) defines a line used in HEOK fishing. The Department is proposing to further define a line with the requirement that floats or cork shall be attached over the entire length of line. The purpose of this requirement is to assist Department enforcement in identifying both the length of the line and the point at which it is attached to a permanent structure. The attached floats on the line will also prevent the line from becoming a hazard to navigation.

Subsections (k)(5) and (k)(9) reference requirements in association with

processing operations. The processing operations of specific concern are the brining of herring eggs on kelp product. In order to clarify this requirement and remain consistent with subsection (e)(3) of these regulations, the Department is proposing to amend these subsections to read "brining".

A minor correction to the form number for the 2004-2005 Herring-Eggs-On-Kelp Permit Application is recommended for purposes of accuracy.

Specific language was added to subsection (i) for the 2003-04 season only. The Department proposes removing this specific language as it is no longer relevant.

Minor editorial changes for proposed for clarity.

(b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 5510, 8389, 8553, and 8555, Fish and Game Code.

Reference: Sections 7850, 7850.5, 8043, 8053, 8389, and 8550-8556, Fish and Game Code.

(c) Specific Technology or Equipment Required by Regulatory Change:

None.

(d) Identification of Reports or Documents Supporting Regulation Change:

- (1) Peer Review of the California Department of Fish and Game's Commercial Pacific Herring Fishery Management and Use of the Coleraine Fishery Model.
- (2) San Francisco Bay Season Summary 2003-04
- (3) Marine Region Responses to Industry Representatives' Requests for More Clarity and Information from the March 25, 2004 DHAC Meeting, dated April 23, 2004.
- (4) Meeting Notes, Director's Herring Advisory Committee Meeting, March 25, 2004, San Francisco, California.
- (5) Meeting Notes, Public Meeting, April 13, 2004, Bodega Bay, California.
- (6) Meeting Notes, Public Meeting, April 13, 2004, Sausalito, California.
- (7) San Francisco Bay Herring Fishery, 2003-04 Season Spawning Biomass Estimate and Proposed Quota for the 2004-05 Season
- (8) Meeting Notes, Director's Herring Advisory Committee Meeting, April 30, 2004, Sausalito, California.
- (9) 2004-05 Herring Eggs on Kelp (HEOK) Permit Application

(e) Public Discussions of Proposed Regulations Prior to Notice Publication:

- (1) Director's Herring Advisory Committee Meeting, March 25, 2004, San

Francisco, California.

- (2) Public Meeting, April 13, 2004, Sausalito, California.
- (3) Director's Herring Advisory Committee Meeting, April 30, 2004, Sausalito, California.

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

(1) Alternative 1: Use of the Combined Biomass Survey Method to Set the Annual Spawning Biomass Estimate and Quota for San Francisco Bay.

A fishing quota of 4,500 tons for San Francisco Bay, representing approximately 10 percent of the 2003-04 combined spawning biomass estimate of 45,276 tons. A fishing quota based on the combined biomass estimate of the spawn deposition and hydro-acoustic surveys would be consistent with the Department's methodology for estimating biomass from 1990 through 2003. Over time, the population trends the two surveys depict have diverged. Following the 2002-03 season, the Department's concerns regarding the population and the survey results led the Department to seek an independent peer review to evaluate the use of a stock assessment model for San Francisco Bay and to evaluate the two survey methodologies (See Attachment 1). One of the findings of the peer review panel was that the Department's method of combining the two surveys has contributed to overexploitation by overestimating biomass. The peer review panel recommended continuing the spawn deposition survey as the spawning biomass estimate for use in setting the fishery quota. Both the spawn deposition survey estimate (34,400 tons) and the combined spawning biomass estimate (45,276 tons) are below the 26-year average of 51,521 tons.

The Department does not support this alternative based on the following concerns: (1) the process of combining the two surveys may lead to the overestimation of the spawning biomass; and (2) the Department believes the estimated below average biomass warrants a conservative management strategy. A conservative management approach in setting the annual quota is best achieved through a determination of the spawning biomass by means of the spawn deposition alone.

(b) No Change Alternative:

A no change alternative would provide a quota for the 2004-05 fishing season of 2,200 tons.

(c) Consideration of Alternatives: In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective as and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. Impact of Regulatory Action:

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The proposed changes are to improve clarity of the regulations, ensure compliance, and promote an efficient, orderly fishery.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

None.

- (c) Cost Impacts on a Representative Private Person or Business:

None.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

- (e) Nondiscretionary Costs/Savings to Local Agencies:

None.

- (f) Programs mandated on Local Agencies or School Districts:

None.

- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4:

None.

- (h) Effect on Housing Costs:

None.

INFORMATIVE DIGEST\POLICY STATEMENT OVERVIEW

Under existing law, herring eggs on kelp (HEOK) may be taken for commercial purposes only under a revocable, nontransferable permit, subject to such regulations as the Fish and Game Commission shall prescribe. Current regulations specify permit limitations; season; fishing area; permittee categories and qualifications; permit conditions; royalty fees; permit application procedures; permit performance deposit requirements; gear, fishing and harvesting restrictions; fishing quotas; landing and processing requirements; and permit suspension conditions and procedures. In addition, current regulations limit the number of permits that can be issued.

The proposed regulatory changes will establish fishing quotas for the 2004-05 HEOK fishing season. Individual HEOK quotas will depend on the total herring fishery quota for San Francisco Bay established by the Fish and Game Commission under Section 163, Title 14, CCR. The proposed quota for the 2004-05 San Francisco Bay herring fishery is 3,440 tons, representing 10 percent of the 34,400 ton estimated spawning biomass. If the Commission were to adopt a quota within this range, this would result in a 6.0-ton individual quota for a "CH" gill net permittee and a 1.7-ton individual quota for a non-"CH" gill net permittee participating in the HEOK fishery.

Subsection (f)(1) of the existing regulations specifies that one of the requirements of a prior permittee is the suspension of kelp for herring eggs on kelp fishing during the immediately preceding herring eggs on kelp season. The proposed regulatory language would remove this requirement and amend the section as follows:

- (1) Prior permittee. Permits shall be issued to all prior permittees. A prior permittee is defined as a person who has:
 - (A) met the requirements under subsection (g) of these regulations, and
 - (B) renewed their herring eggs on kelp permit for the immediately preceding herring eggs on kelp season, and
 - (C) submitted all fees from prior seasons.

Subsection (j) defines a line used in HEOK fishing. In an effort to facilitate enforcement and provide for safe navigation in the areas around herring eggs on kelp fishing, the proposed regulation will further define a line as follows:

- Kelp lines shall have floats or cork over the entire length of the line.

Subsections (k)(5) and (k)(9) reference processing operations. The proposed regulatory change would change the language to refer to brining, for consistency with existing language.

Subsection (i) contains language specific to the 2003-04 season only. The proposed amendment would remove this language as it is no longer relevant.

A correction to the form number for the 2004-2005 Herring-Eggs-On-Kelp Permit Application is recommended for purposes of accuracy.

Minor editorial changes are proposed for clarity and accuracy.